the dockets of the federal courts, while, I understand, some of the state judges actually do not have enough litigation to keep them busy.

Suits by the injured party directly against the insurer may operate justly under the Civil Law of Louisiana where jury verdicts are not important, see Wright v. Paramount-Richards Theatres, 5 Cir., 198 F. 2d 303, 306, but where there is a common law right of trial by jury, as in the federal courts, it has been repeatedly recognized that juries are more prone to find liability and to assess heavy damages against a liability insurance company than against the insured. The mere mention of insurance to a jury is reversible error in all but four states of the union, Wheeler v. Kudek, 397 Ill. 438, 74 N.E. 2d 601, 4 A.L.R. 2d 761. With both the insured and the insurer present, the federal courts could, in futherance of justice and to avoid prejudice, order separate trials as to the cause of action against the insured and as to the existence and coverage of the policy. See Rules 20(b) and 42(b), Federal Rules of Civil Procedure, 28 U.S.C.A. In the absence of the insured as a party defendant, the federal court has no adequate power to protect a defendant insurance company from that known and well recognized prejudice.[1] This Court would be naive not to realize that

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1. "But a trial in court is never, as respondents in their brief argue this one was, 'purely a private controversy** of no importance to the public.' The state, whose interest it is the duty of court and counsel alike to uphold, is concerned that every litigation be fairly and impartially conducted and that verdicts of juries be rendered only on the issues made by the pleadings and the evidence." N. Y. Central R. R. Co. v. Johnson, 279 U. S. 310, 318, 49 S. Ct. 300, 303, 73 L. Ed. 706.

only of which is federal in character." 289 U.S. at page 246, 53 S. Ct. at page 589. It is permissible in Louisiana for both causes of action to be established in a single suit against the insurer, but when the diversity jurisdiction of a federal court is invoked, that court must recognize the two separate and distinct causes of action, and must accept jurisdiction of that one only which is federal in character.

If the district judge and I are mistaken and diversity jurisdiction does exist, it seems to me that the insured is an indispensable party defendant. "Whether parties are indispensable must be determined by the federal court according to federal rather than state rules, for the question of their jurisdiction is one which the federal courts must determine for themselves." Ford v. Adkins, D.C. 39 Supp. 472, 474. See also De Korwin v. First National Bank of Chicago, 7 Cir., 156 F. 2d 858; 3 Moore's Federal Practice, 2d Ed., Sec. 19.07, pages 2152, 2153.

The principles announced by Mr. Justice Curtis in Shields v. Barrow, 17 How. 129, 130, 136, 15 L. Ed. 158, as to when parties are indispensable are still sound despite the difficulty in application of those principles. See 3 Moore's Federal Practice, Sec. 19.07, page 2150. Among other tests, a person is an indispensable party if his presence is necessary to enable the court to do complete and final justice between the parties before the court and, further, if the interest of the absent party is "of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such

> "This court would be naive not to recognize that that factor has much to do with the bringing of most of the automobile damage suits in the federal courts rather than in the state courts of Louisiana."

Congress granted jurisdiction to the federal courts in diversity of citizenship cases to guard against possible discrimination by state courts in favor of resident over non-resident litigants but it appears that that which was designed as a shield to protect the non-resident litigants has, by the decision rendered by the court below, been converted into a club to be used by the resident against them.

2.

In this type of proceeding the federal court cannot do final and complete justice and the proceedings therein lead to a result substantially different from that which would be attained in the state court. Should the defendant insurer be successful in avoiding liability in a direct action suit instituted in the federal court by the injured person, that would not prevent the injured person from then going into the state court and instituting another suit against the insured. As pointed out by Judge Rives:

> "The Judgment in the first suit would not conclusively estop the injured party for the issues would be different and it might be that judgment was based on the failure of proof as to the existence and coverage of the the policy, matters not involved in the suit against the insured."

(a) Is the insured in such action an indispensable party?

(b) Should the federal court accept jurisdiction on the grounds of diversity of citizenship of parties where the court cannot do final and complete justice and the controversy may be left in such a condition that its final termination may be wholly inconsistent with equity and good conscience?

2.

Should such effect be given by the federal courts to an act of the legislature of Louisiana as would result in citizens of Louisiana being afforded an unfair and prejudicial advantage over non-resident litigants by invoking the jurisdiction of the federal court on the grounds of diversity of citizenship? This question in turn involves the following subsidiary questions:

(a) Are those provisions of the Louisiana R. S. 22:655 granting an injured party the right to sue a public liability insurer alone purely procedural and, if so, are they applicable in a federal court action?

(b) Should the federal court entertain jurisdiction on the grounds of diversity where such diversity as exists arises only by virtue of a state statute and where the proceedings in the federal court lead to a result substantially different from that which would be attained in the state court?

that factor has much to do with the bringing of most of the automobile damage suits in the federal courts rather than in the state courts of Louisiana.

The transfer of most of the casualty damage suit litigation from the state to the federal courts thus defeats any beneficient public policy of the Louisiana direct action statute intended to operate under the civil law system of Louisiana. It is further in direct conflict with the purpose of diversity jurisdiction designed to avoid "possible discrimination by state courts in favor of resident over non-resident litigants", 54 Am. Jur., United States Courts Sec. 57; and operates rather to give full play to discrimination against the casualty insurance companies.

It seem to me that federal jurisdiction should be denied or declined upon several grounds. First, it involves the unconstitutional assumption of jurisdiction over controversies between citizens of the same state of Louisiana. Second, if not actually equitable in nature, the rights and procedure are so closely akin thereto that the same principles should be applied by the federal courts as in equity suits, and it should be held (a) that the insured is an indispensable party defendant, and (b) that in the exercise of their sound discretion in matters prejudicial to the public interest and which threaten the rightful independence of state governments in carrying out their domestic policy, the federal courts should decline to exercise jurisdiction against the insurer alone.

IN THE

Supreme Court of the United States

OCTOBER TERM, ~~1952~~ 1954

No. ~~862~~ [redacted] //

LUMBERMENS MUTUAL CASUALTY COMPANY
Petitioner

vs.

FLORENCE R. ELBERT
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

LECOMTE, SHREVEPORT, LOUISIANA

Where a jury merely returns a verdict "for the defendant" there is, of course, no means of determining the basis for that decision. If the injured party is thus permitted to sue the insurer alone in the federal court that court cannot do final justice and the controversy may be left in a completely unfinished condition.

Mr. Justice Douglas pointed out in the decision rendered by this Court in *Reagan vs Merchants Transfer* & Warehouse Company, 337 U.S. 530, 93 Law Ed. 1520 that in diversity cases the rights enjoyed under local laws should not vary because enforcement of those rights was sought in the federal court rather than in the state court and in the case of *Guaranty Trust Company vs York, 326* U.S. 96, 89 Law Ed. 2079 Mr. Justice Frankfurter, as the organ of the Court, declared that in such cases the outcome of the litigation in the federal court should be substantially the same as it would be if tried in a state court. Because of the peculiarity of the judicial system in the state of Louisiana, the application of the Louisiana direct action statute (L.R.S. 22:655) in a proceeding in the federal court leads to a result substantially different from that which would be attained in the state court. The practice in the courts of Louisiana is well outlined in the dissenting opinion of Mr. Justice McLean in the case of *Parsons vs Bedford, 3 Pet. 433, 7 Law Ed. 732.* The Louisiana Code of Practice provides for jury trials in certain civil cases but appellate courts have the right and the duty to review both the law and the facts in all civil cases. *Wright vs Paramount-Richards Theatres, 198 Fed (2) 303;*

(c) Should the federal court exercise diversity jurisdiction where to do so would be prejudicial to the public interest and would not show proper regard for the rightful independence of state government in carrying out their domestic policy?

STATUTES INVOLVED

The applicable portions of the statutes involved are set forth in the appendix, infra, pages 15-16.

STATEMENT

On February 21, 1951, Mrs. Florence R. Elbert, a resident and citizen of Shreveport, Louisiana, was injured after she had alighted from an automobile which had been brought to a stop in front of her home in Shreveport, Louisiana. The automobile was owned by Mr. S. W. Bowen, a resident and citizen of Shreveport, Louisiana, and at the time was being operated by his wife, Mrs. S. W. Bowen, a resident and citizen of Louisiana.

The Lumbermens Mutual Casualty Company had issued to Mr. S. W. Bowen a contract of public liability insurance covering the vehicle owned by him and driven by his wife under which said company obligated itself to pay on behalf of the insured those sums which the insured should become legally obligated to pay as damages because of bodily injuries arising out of the ownership, maintenance and use of the insured vehicle.

Under date of December 4, 1951, Mrs. Florence R. Elbert instituted the present action directly against

Let us first consider the nature in law of these direct actions against the insurer. Under the law of Louisiana, an action in tort arises solely from Article 2315 of the LSA-Civil Code reading in part: "Every act whatever a man that causes damage to another, obliges him by whose fault it happened to repair it;***."

This action was brought against the appellee insurance company alone under the provisions of LSA-R.S. 22:655, reading in part:

> "***The injured person or his or her heirs, at their option, shall have a right of direct action against the insurer within the terms and limits of the policy in the parish where the accident or injury occurred or in the parish where the insured has his domicile, and said action may be brought against the insurer alone or against both the insured and the insurer, jointly and in solido.***"

By its policy issued to the named insured, the appellee company obligated itself "to pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury***." The right of direct action by the injured person against the insurer must be "within the terms and limits of the policy." A cause of action against the insured is the first requisite to a direct action against the liability insurer. Reeves v. Globe Indemnity Co. of New York, 182 La. 905, 162 So. 724, 735; Mock v. Maryland Casualty Company, La. App., 6 So. 2d 199; Burke v. Massachusetts Bonding & Insurance Company, 209 La. 495, 24 So. 2d 875. The

a condition that its final termination may be wholly inconsistent with equity and good conscience" Shields v. Barrow, supra. This court has said that "the fact that the decree would not be technically binding on the absent parties is not the controlling factor." Keegan v. Humble Oil & Refining Co., 5 Cir., 155 F. 2d 971, 973. In State of California v. Southern Pacific Co., 157 U.S. 229, 255, 15 S. Ct. 591, 601, 39 L. Ed. 683, the Supreme Court says:

> "Irrespective, then, of the extent technically speaking, of the effect and operation of a decree as to the seven parcels, based on that ground, as *res adjudicata*, it is impossible to ignore the injuiry whether the interests of persons not before the court would be so affected, and the controversy so left open to future litigation. as would be inconsistent with equity and good conscience."

While the injured person under the Act has a right of direct action against the insurer, the insured also has certain property rights in the insurance policy, viz.: the insured has the right to be protected from liability to the extent of the coverage of the policy, whether to the injured person or to some other person who has been or may be injured during the term of the policy.

If the injured party sues the insured first and the insurer has notice of the litigation and an opportunity to control its proceedings, the insurer is bound by the determination of liability of the insured. 8 Appleman's Ins. Law & Practice, Sec. 4860, and cases cited. Whether the reverse holds true, that is, whether the insured would

Louisiana Constitution of 1921, Article 7, Section 10. Thus it appears that in the application of these statutory provisions of the legislature of Louisiana the appellate courts of that state are not only entitled to, but under a duty to, review the evidence and to determine for themselves the facts upon which their ultimate decision must rest and, if their conclusions do not coincide with that of the trial jury, they make their own findings of fact and render judgment accordingly. These appellate judges being trained, experienced jurists, the dangers that arise out of the direct action proceedings from the prejudice and bias against the insurance companies which exists in the minds of the ordinary lay juror is thereby corrected. The federal courts, on the other hand, are forbidden to re-examine any fact tried by a jury otherwise than according to the rules of the common law, while the Louisiana state courts can review the facts in all civil cases. *Wright vs Paramount-Richards Theatres* (supra).

3.

The question involved is important. The determination of the question presented will affect hundreds of thousands of persons in the State of Louisiana as well as the entire insurance industry doing business in that state. The rates which must be charged by an insurance company for its contracts of insurance is, of course, determined by their loss experience in the particular area in which the contracts are written. If the federal courts with its jury system is to entertain jurisdiction in these cases and the

Lumbermens Mutual Casualty Company alone. The Jurisdiction of the federal court was urged upon the basis that the matter in controversy was between citizens of different states title 28 USC Sec. 1332(a). The institution of the action by the plaintiff against the public liability insurer alone was brought under the provisions of Louisiana Revised Statutes 22:655.

The Lumbermens Mutual Casualty Company moved to dismiss the action urging that the provisions of the Louisiana Revised Statutes 22:655 were procedural and, therefore, not applicable in the federal court and further that proper diversity of citizenship between the parties did not actually exist since the real matter in controversy was the determination of whether or not Mrs. S. W. Bowen, a citizen of Shreveport, Louisiana, had committed an act of negligence in Shreveport, Louisiana which had resulted in an injury to the plaintiff who was also a citizen of Louisiana.

The district court upheld the defendant's motion to dismiss with an opinion holding that to sustain diversity jurisdiction there must exist an actual, substantial controversy between citizens of different states; that in considering between whom the actual controversy existed the court must determine the principal purpose of the suit and the primary and controlling matter in dispute. Applying those principles the court concluded that it was obvious that the primary, controlling matter in dispute was the determination of the rights of the plaintiff, a

be bound by the determination of liability against his insurer, is a much more difficult question. See 29 Am. Jur., Insurance, Sec. 1084; Annotations, 137 A.L.R. 1016, 121 A.L.R. 890; 50 C.J.S., Jugdments, paragraph 789. If the insured is so bound, then obviously he is an indispensable party defendant for he may lose his counterclaim against the injured person or may be deprived of a part or all of his insurance protection without having his day in court.

Even, however, if the judgment would not be technically binding on the insured as to the issue of liability, that fact is not the controlling factor in determining whether the insured is an indispensable party. Keegan v. Humble Oil & Refining Co., 5 Cir., 155 F. 2d 971, and authorities there cited. The injured party, having failed in a suit against the insurer direct, might still sue the insured. The judgment in the first suit would not conclusively estop the injured party for the issues would be different and it might be that that judgment was based on the failure of proof as to the existence and coverage of the policy, matters not involved in the suit against the insured. The injured party having recovered against the insured, the insured could then call on the insurer to pay the damages and the fact that the insurer has successfully defended against the injured party would be no answer to the insured. The result follows that if the injured party is permitted to sue the insurer alone in the federal court, the court cannot do final and complete justice and the controversy may be left in such a condition that its

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other requisite is, of course, the existence and coverage of the policy, a matter not here in dispute.

The latest pertinent decision of the Supreme Court of Louisiana, West v. Monroe Bakery, 217 La. 189, 46 So. 2d 122, 123, has said that the object of the statute is to confer:

> "***substantive rights on third parties to contracts of liability insurance, which become vested at the moment of the accident in which they are injured."

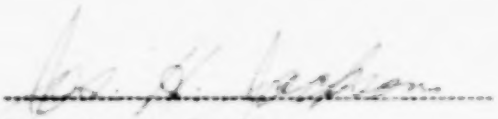
See also Fisher v. Homer Indemnity Co., 5 Cir., 198 F. 2d 218.

An even later opinion of the Louisiana Court of Appeals for the second circuit has spoken of the direct action statute as being procedural in nature. Churchman v. Ingram, La. App., 56 So. 2d 297. The confusion and disagreement as to whether the Act was merely procedural or created a substantive right is fully set forth in an earlier opinion by Judge Dawkins, Bayard v. Traders & General Ins. Co., D.C., 99 F. Supp. 343, 346-353. The case of New Amsterdam Casualty Company v. Soileau, 167 F. 2d 767, 770, 6 A.L.R. 2d 128, indicates that the act is both procedural and substantive. Clearly that part of the Act which gives a right of action direct against the insurer is substantive. Just as clearly, it seems to me, that part which provides that the action may be brought against either the insurer alone or against both the insured and the insurer jointly is procedural, for the Act itself recognizes that it is just as possible for the injured

local citizens of Louisiana are to be allowed to institute these actions directly against the foreign insurance company alone, the biased and prejudicial advantage which these plaintiffs will enjoy will substantially increase the loss experience of the insurance companies in the State of Louisiana. (The impact of these proceedings in this state has already been noted with great alarm by the insurance industry.) The net result will be, either that the companies will have to discontinue doing business in this state, or else the insurance purchasing public of the state will have to bear a considerable burden as the result of substantially increased insurance premiums.

CONCLUSION

For reasons stated, it is respectfully submitted that the petition herein for a writ of certiorari should be granted.



Joseph H. Jackson

OF COUNSEL
Charles L. Mayer

May 1953

person to reach the proceeds of a liability policy in an action against both the insured and the insurer as in one against the insurer alone.

The basis for this Court's holding in New Amsterdam Casualty Co. v. Soileau, supra, that the action might be maintained in the federal court by the injured person against the insurer alone was that the Act subrogates "the injured person to all the rights of the insured within the terms and limits of the policy." See also Cushing v. Maryland Casualty Co., 5 Cir., 198 F. 2d 536.

"A subrogee***occupies the position of the party for whom he is substituted, and succeeds to the same but no greater rights. He cannot acquire any claim, security, or remedy which the creditor did not have." 50 Am. Jur., Subrogation, Section 110, page 753, and cases cited. Under the terms of the policy, the insured has a right to call upon the company to defend an action against him but until he has been adjudged responsible to pay the injured party, the insured has no right to call on the insurer to pay the damages. Instead, therefore, the statute having the effect of a legal subrogation in favor of the injured person to the rights of the insured, the operation of the statute in giving the injured person a right of action against the insurer is more accurately described by the Supreme Court of Louisiana in Ruiz v. Clancy, 182 La. 935, 162 So. 734, 736, as accomplished "by compelling the insurer to respond—within the limits of the policy—to the obligation of the insured." The Louisiana Supreme Court has said that the suit by the injured person against

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citizen of Louisiana, against the alleged tort-feasor, a citizen of Louisiana, under the cause of action created by Article 2315 of the Revised Civil Code of Louisiana (R 15, 107 Fed. Sup. 299).

The plaintiff filed a motion for rehearing which was overruled by the district court with an opinion further emphasizing that the only cause of action existing in favor of a plaintiff under the laws of Louisiana as the result of an alleged tort arises under Article 2315 of the Louisiana Revised Civil Code and that the actual and real controversy involved was the determination of the issue of negligence as between the plaintiff and the driver of the automobile, both citizens of Louisiana (R 40, 108 Fed. Sup. 157).

The plaintiff appealed from the judgment of the district court sustaining defendant's motion to dismiss. The court below reversed the decision of the district court and ordered the case remanded without making any comment upon, or disposing of, the contentions and principles advanced by the district judge in his two written opinions and by the appellee in support of the decision of the district court. The court below merely declared that "upon principle and authority" the judgment of the district court was wrong and should, therefore, be reversed. Just what "principles" were relied upon were not stated and the only "authority" indicated by the court were three decisions previously rendered by that court (one of which is now before this Court, certiorari having been granted March 9, 1953, The Jane Smith, Maryland Casualty Company et al vs. Gertrude Picard Cushing et al, No. 498), all of

final termination may be wholly inconsistent with equity and good conscience.

Finally, if I am mistaken both as to lack of diversity jurisdiction and in my view that the insured is an indispensable party defendant, then it still seems to be that the federal court, as a matter of sound discretion, should decline to exercise jurisdiction against the insurer alone because to do so would be prejudicial to the public interest and would not show "proper regard for the rightful independence of state governments in carrying out their domestic policy." Commonwealth of Pennsylvania v. Williams, 294 U.S. 176, 185, 55 S. Ct. 380, 385, 79 L. Ed. 841; Burford v. Sun Oil Co., 319 U.S. 315, 318, 63 S. Ct. 1098, 87 L. Ed. 1424; Great Lakes Dredge & Dock Co. v. Huffman, 319 U. S. 293, 297, 63 S. Ct. 1070, 87 L. Ed. 1407; Meredith v. City of Winter Haven, 320 U. S. 228, 235, 64 S. Ct. 7, 88 L. Ed. 9; Alabama Public Service Commission v. Southern Ry. Co., 341 U.S. 341, 349, 350, 71 S. Ct. 762, 95 L. Ed. 1002.

I, therefore, respectfully dissent.

APPENDIX

STATUTES INVOLVED

1. Title 28 USC Section 1332(a)

   "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3,000.00 exclusive of interest and costs, and is between:

   "(1) Citizens of different states."

2. The Revised Civil Code of the State of Louisiana, Article 2315

   "Every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it.****"

3. Louisiana Revised Statutes (1950) 22:655

   "No policy or contract of liability insurance shall be issued or delivered in this state, unless it contains provisions to the effect that the insolvency or bankruptcy of the insured, shall not release the insurer from the payment of damages for injuries sustained or loss occasioned during the existence of the policy, and any judgment which may be rendered against the insured for which the insurer is liable which shall have become executory, shall be deemed prima facie evidence of the insolvency of the insured, and an action may thereafter be maintained within the terms and limits of the policy by the injured person or his or her heirs against the insurer. The injured person or his or her heirs, at their option, shall have a right of direct action against the insurer within the terms and limits of the policy in the

which had been considered and discussed at length in the opinion of the district court and none of which had discussed or considered the issues upon which the district court had based its conclusions (R 68, 201 Fed. Rpr. (2) 500).

The appellee in the court below timely filed an application for rehearing which was refused by a majority of the court without any further written reasons. Judge Rives, however, dissented with written reasons (R 75, 202 Fed. Rpr. (2) 744-appendix, infra, pages 17-30) Judge Rives took note of the fact that suits by an injured party directly against an insurer may operate justly under the civil law of Louisiana where the appellate court has the right and the duty to review both the law and the facts in all civil cases and render judgment on their own findings without regard to the holding of a trial jury, but that in the federal courts such procedure cannot be followed, that it has been repeatedly recognized that juries are more prone to find liability and to assess heavy damages against an insurance company alone than against an insured, and that the mere mention of insurance to a jury is a reversible error in practically all of the states of this union. He further notes that one of the principal reasons for plaintiffs bringing this type of action in the federal court in Louisiana is to obtain the prejudicial advantage afforded by the federal jury system and that to entertain such litigation is in direct conflict with the purpose of diversity jurisdiction which was designed to avoid possible discrimination in favor of a resident over a non-resident litigant.

the insurer is still *ex delicto*, a suit for damages for personal injuries. Reeves v. Globe Indemnity Co., supra. Instead of the injured party being substituted as a party plaintiff in the place of the insured, it is more realistic to say that the insurer is substituted as a party defendant in the place of the insured. The overall effect of the statute, of the accident, and of the suit is to compensate the injured person by damages paid out of an asset provided by the insured.

By virtue of written provisions in its Code, Louisiana has a limited jurisdiction akin to equity in some cases "where there is no express law" or "where positive law is silent", LSA-Civil Code Art. 21. It does not have the "common law" and "equity" systems established in other states. Le Blanc v. City of New Orleans, 138 La. 243, 70 So. 212, 217; Hyman v. Hibernia Bank & Trust Co., 139 La. 411, 71 So. 598, 603; Osborn v. City of Shreveport 143 La. 932, 79 So. 542, 545, 3 A.L.R. 955; Southern Bell Telephone & Telegraph Co. v. Louisiana Public Service Commission, 183 La. 741, 164 So. 786, 790.

The Louisiana direct action statute seems intended to produce the results permitted in common law states by statutes like, for example, the Alabama statute, Alabama Code 1940, Title 28, Sec. 12, where "the judgment creditor may proceed in equity against the defendant and the insurance company to reach and apply the insurance money to the satisfaction of the judgment." See also 19 Am. Jur., Equity, Sec. 188; 8 Appleman's Ins. Law & Practice, Sec.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No.

LUMBERMENS MUTUAL CASUALTY COMPANY
Petitioner

vs.

FLORENCE R. ELBERT
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Lumbermens Mutual Casualty Company prays that a writ of certiorari be issued to review the judgment of the Court of Appeals for the Fifth Circuit entered in the above entitled case on the 29th day of January, 1953.

OPINIONS BELOW

The opinion of the district court on motion to dismiss is reported at 107 Fed. Supp. 299. Its opinion on